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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 73-474

UNITED STATES OF AMERICA
ex rel. FRANCIS C. SMITH
Petitioner

V.

CARL ROBINSON, Warden
Connecticut State Prison
Somers, Connecticut

JOHN R. MANSON, Commissioner
Connecticut Department
of Corrections
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Pro se

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The petitioner Francis C. Smith, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 26, 1973.

Opinion Below

The order and judgment of the United States Court of Appeals for the Second Circuit appears in the Appendix hereto, page 28. There was no opinion. The opinion of the U.S. District Court for Connecticut, not yet reported, appears in the Appendix hereto, page 25. The Supreme Court of Connecticut opinion, State V. Smith, 138 Conn. 196, appears in the Appendix hereto at pages 7, 8 - 15.

Jurisdiction

The judgment and order of the United States Court of Appeals for the Second Circuit was entered on June 26, 1973, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented for Review

1. Whether on the facts of the case the conviction herein is constitutional under the 14th Amendment of the Constitution of the United States of America, and other amendments embraced thereby, when obtained and upheld on evidence knowingly allowed by the State Prosecutors to be falsely used with the jury to convict wrongfully on the trial.

2. Whether on the facts of this case the Connecticut Statute as used and applied herein is Constitutional under the 14th Amendment of the Constitution of the United States of America, and other amendments embraced thereby.

3. Whether on the facts of this case, the petitioner's Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil procedure, did the Courts below err in not giving judgment to the petitioner in view of the State Attorneys admission that the conviction had been obtained on evidence falsely used on the trial to convict.

4. Whether on the facts of this case the Federal Courts below denied jurisdiction and relief erroneously on the issues herein presented, where jurisdiction was predicated on the U.S. District Court's own records, and the conclusions stated in dismissing the petition were totally devoid of support in the record, and have and had nothing to do with a previous claim made on the sufficiency of the indictment.

5. Whether on the facts of this case the federal Courts below erroneously denied jurisdiction and relief on the claim that the state courts had violated the petitioner's constitutional rights in the manner in which the state statute involved was used and applied by them.

Sections of the Constitution of the United States Involved

6th Amendment

In all criminal prosecutions, the accused shall enjoy the right ++++ to be informed of the nature and cause of the accusation ++++.

14th Amendment

++++ No State ++++ shall ++++ deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections of the Constitution of the State of Connecticut Involved

Article First, Section Nine

++++ No person shall be holden to answer for any crime, the punishment of which may be death or life imprisonment, unless on a presentment or an indictment of a Grand Jury ++++.

Article First, Section Twenty-one

The right of trial by jury shall remain inviolate.

Article Second

The powers of government shall be divided into three distinct departments, and each of them confided to a serarate magistracy, to wit, those which are legislative, to one; those which are

executive, to another; and those which are judicial, to another.

(See Connecticut Constitution, Vol. I, Conn. Gen. Stats. Revision of 1949, pages 27, 30 and 31.)

Statute Involved

Section 8350 Connecticut General Statutes Revision of 1949, Vol. III, Page 3049.

All murder perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or committed in perpetrating or in attempting to perpetrate, any arson, rape, robbery or burglary, or injury to any person or property by means of any explosive compound, shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree ++++.

Indictment Involved

To the Honorable Superior Court for the County of Fairfield, State of Connecticut, now in session at Bridgeport in said County, for the transaction of criminal business:

The Grand Jurors within and for said County accuse Francis Clifford Smith, of 35 Linden Avenue, Darien in said County, of murder in the first degree and charge, that on the 23rd day of July 1949, at Greenwich in said County, the said Francis Clifford Smith wilfuly, deliberately, with

premeditation and malice aforethought, did shoot and kill one Grover S. Hart, against the peace and contrary to the form of the statute in such case made and provided.

Oct. 4th 1949
a true Bill
David H. MacKenzie
Foreman Grand Jury

Federal Rules of Civil Procedure Involved

Rule 56 (a)

A party seeking to recover upon a claim ++++ may ++++ move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(e) ++++ When a motion for summary judgment is made as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond summary judgment, if appropriate, shall be entered against him.

Rule 15 (a)

A party may amend his pleading once ++++ before a responsive pleading is served ++++. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party.

Statement of the Case

The petitioner was indicted on Oct. 4, 1949, of murder in the first degree, and convicted and sentenced to death therefor on June 7, 1950, and later commuted to life imprisonment without pardon or parole on June 7, 1950.

The crime charged occured in the Indian Harbor Yacht Club in Greenwich, Connecticut on July 23, 1949. One Grover S. Hart was found shot and some .?? caliber cartridge cases were found in the vicinity. Grover S. Hart was night watchman.

Twenty-four hours later a co-defendant and the self-confessed killer in this case drove in a gray Cadillac to the Hollywood Cafe in Brewster New York, some fifty miles from Greenwich. He fled from the car in the presence of two New York state policemen, who searched the car and removed a .22 caliber Colt pistol, some ties and insignia sold at the said yacht club, and some property of club personell. This co-defendant, George Frankie Lowden, pleaded guilty to the killing in Nov. 1949 and was sentenced to life imprisonment, and paroled in 1966.

To convict this petitione the State sought on the trial to connect the petitioner by circumstantial evidence with Lowden at the said Hollywood Cafe in Brewster, New York. The State offered the testimony of two witnesses that they had seen the petitioner driving a gray Cadillac some two

months before the crime charged occured. One, an Edith Springer, later confessed perjury. She on the trial sought to place the petitioner in the gray Cadillac in which Lowden had gone to the Hollywood Cafe and which was stolen by Lowden sometime in late June 1949 while the petitioner had been driving a Cadillac sine sometime in the early month of May 1949 to the William Peatt resort in Ridgefield, Connecticut, who corroborated that the petitioner had pointed the car out a few feet away as a Fleetwood Cadillac, a different model than Lowden's. The Hollywood Cafe owner James Kane testified that he remembered seeing the petitioner in his Cafe sometime that summer but could not remember when. There was no evidence the petitioner drove a Cadillac after the Cadillac involved was stolen by Lowden, or that connected the petitioner to Lowden at any time or place. This case is totally devoid of evidentiary support as to the petitioner.

To attempt to make a case the State subpoenaed Lowden, who refused to testify. Because he had said he would tell the truth, the State claimed "surprise" on testimony it had brought upon itself in pressing for testimony. The State was then allowed to cross-examine him, and on this guise the State made its case out of its own mouth while Lowden denied it all, under oath of course. Under Connecticut law a party is bound by adverse tes-

timony adduced cross-examining his own witness.

In the charge to the petit jury they were instructed that if they found an "unlawful" act involved in the crime charged, a verdict of murder in the first degree was proper. This charge appears on page 2 of the Appendix. No instructions of any kind were given as to what at law was recognised as an unlawful act. The "law" was now what the jury found it to be, and whether a death penalty should be inflicted therefor, all State legislative enactment to the contrary notwithstanding, the whole body of the criminal law wiped out and nullified in one fell swoop, and placed in limbo. After a quick conviction, the State Supreme Court on appeal found that the articles removed from the Cadillac in Brewster, New York, justified a verdict of murder in the first degree as a killing in a theft. State V. Smith, 138 Conn. 196, 201.

In Connecticut a State Court may acquire jurisdiction to try a Capital case, or one where the punishment may be life imprisonment, only on a presentment or indictment of a Grand Jury. Connecticut Constitution, Article First, Section Nine (page 4 supra). The Grand Jury indicted contrary to the form of the statute in such case made and provided. This statute is Sec. 8350, Connecticut Gen. Stats. Revision of 1949. The Grand Jury charged a deliberate and premeditated

killing under the statute. The petitioner's contention here, and in the Courts below, is, in view of the indictment and the state statute involved on which the indictment was predicated, and therefore the state court's jurisdiction also, that the state court's charge allowing the jury to convict for murder in the first degree if the jury found an "unlawful" act involved in the crime charged, rendered the state statute too vague and uncertain by constitutional standards, in that the requirement that the statute reasonably inform the petitioner of that which he stood charged, was not met. The trial court's charge also allowed the petit jury to override the State Legislature in its state constitutional domain to enact exclusively the law, and that therefore the state courts lost jurisdiction dependent on the statute involved under the indictment (See Article Second, Conn. Const., page 4 supra). This Court requires that a State statute reasonably inform an accused. Lanzetta V. New Jersey, 306 U.S. 451.

The jury that was allowed in this case to run with a free rein was composed mostly of "talesmen" handpicked by the sheriffs of the County after almost a full year delay to trial while the regular jury panel was being exhausted.

After conviction, two new trial petitions

were made and denied, one on a confession of perjury by the State witness Edith Springer; the other on a confession by one Blumetti that he and Lowden, not the petitioner, were guilty of the crime charged. Smith V. State, 139 Conn 249 and 141 Conn. 202. Those issues are irrelevant here.

In Nov. 1964 the petitioner filed in the U.S. District Court for Connecticut a petition for a writ of habeas corpus. Denied, U.S. ex rel. Smith V. Reincke, 239 F. Supp. 887; aff'd 254 F. 2d 417. In reply to a claim then made on the sufficiency of the indictment to support a felony conviction, the State Attorneys for Fairfield County Connecticut admitted that no unlawful act of any kind had been involved in the crime charged. This admission is set out in full in the Appendix hereto on page 4. The trial judge's charge, page 2 of the Appendix, and the opinion in State V. Smith, 138 Conn. 196, 201, clearly show that this conviction was obtained and upheld as an alleged killing in an unlawful act. The State Attorneys now claim that all this was immaterial and that in fact they did not have to prove a felony killing to get a conviction. This argument is purely academic. The conviction was in fact obtained as a killing in an unlawful act now admitted never to have happened. The articles removed from the Cadillac involved and used as a

"connecting" link were crucial and vital to the State's whole case.

On the basis of the admissions of the State Attorneys on the previous petition in the U.S. District Court for Connecticut, and other claims, this present action was begun on a petition for a writ of habeas corpus filed Jan. 2, 1972, under 28 U.S.C. § 2241. Federal jurisdiction was invoked under Cole V. Arkansas, 333 U.S. 196, on the claim that the state courts had used and applied the state statute unconstitutionally by upholding the conviction thereunder when the jury was not bound by the statute and its use was a mere fiction under circumstances wherein the jury had been allowed to make the law, and the statute was nullified and avoided. Obviously also, Federal jurisdiction lay on the U.S. District Court records. The matter of the "unlawful" act was involved in all the claims made, and Sanders V. United States, 373 U.S. 1, at 18, required all these claims to be presented together. Fay V. Noia, 372 U.S. 391, was also cited in support of jurisdiction.

After the Return to the petition was made by the Respondent, at page 15 in Appendix, Motion for Summary Judgment was made by the petitioner after making Replication to the Return. Motion re Summary Judgment, page 18, Appdx. Replication, at page 16, Appdx. Affidavits were made by the

petitioner in support of summary judgment. At pages 19 and 23, Appdx. Claims on which summary judgment was made, at page 20, Appdx..

The Respondent's Return to the petition was a series of indefinable vagaries. The Respondent failed to make any record identifiable as such. On summary judgment the Respondent set forth not a single fact why it should not issue, as Rule 56 of the Federal Rules of Civil Procedure required. Months after Summary Judgment was moved for, and long after decision was reserved on the motion, the Respondent filed an "Amended Return" without leave or permission as required by Rule 15 (a) of the Federal Rules of Procedure. This was a series of self-serving declarations and conclusions with no specified facts in their support and was an obvious ploy in evasion of the Rules. The petitioner moved to strike the matter. On the pleadings and under Rule 56 the petitioner was clearly entitled to prevail on the rulings of this Court in Alcorta V. Texas, 355 U.S. 28 and Napue V. Illinois, 360 U.S. 264. Rules 56 (a) and (e), and 15 (a), appear on page 4 supra.

The District Court ignored the Rules of procedure, the evidence and admissions, this Court's rulings, and denied and dismissed the petition alleging that these issues had already been decided against the petitioner, with the record completely devoid of any support at all for such

a conclusion, a conclusion that can not stand up and is totally unsustainable.

Both the District Court and the Court of Appeals denied a certificate of probable cause under 28 U.S.C. § 2253. The petitioner is here from the final judgments and orders of the Second Circuit on a petition for a writ of certiorari.

This petition is submitted pro se and counsel will be present on the case if certiorari is granted, and the petitioner so acknowledges to the Court.

Reasons for Granting Writ

1. The decisions below directly conflict with and ignore the rulings of this Court on knowing use of evidence by State Prosecutors to convict falsely.

The conviction herein was obtained and sustained upon evidence used falsely with the jury to convict for an alleged killing in an "unlawful" act that the state prosecutors now admit never happened. That evidence served both as a vital "connecting" link and to convict for murder in the first degree, falsely. The State Attorneys have admitted this evidence was falsely used. The Courts below have ignored the rulings of this Court in Alcorta V. Texas, and Napue V.

Illinois, supra. In both these cases this Court has reversed the convictions on evidence used to convict falsely. The Courts below also ignored a large body of such decisions rendered in the various Circuit Court of Appeals of the United States. The U.S. District Court for Connecticut allowed that this issue had already been decided previously and adversely although never before presented. There is nothing in the record to support this holding either. The District Court obviously didn't care to abide by the decisions of this Court. This Court's supervisory power is clearly needed here.

2. The Connecticut Statute Involved on first degree murder, and virtually every such statute in the United States, by their terms and as used and applied raise serious and significant questions as to their Constitutional validity.

In Connecticut as in every State of the United States the legislative power is historically and by State constitutional provision in the various state legislatures. Either by express provision or by judicial interpretation as to what is deliberate and premeditated homicide, death and life sentences are imposed under statutes for homicide in an "unlawful" act in virtually all the States. See Wharton's Criminal Law by Ronald A. Anderson, Sections 251 and 264.

Are these statutes either by their express terms or as used and applied, unconstitutional under the 14th Amendment to the Constitution of the United States of America, and other Amendments embraced thereby, for any one or more of the following reasons:

a) May jurors in State trials under such statutes decide what is an "unlawful" act a homicide in which shall be murder in the degree they may choose so that the jury is in fact deciding the "law," when historically and usually by express state constitutional provision the legislative power is in the State legislature.

b) Where a State legislature with the sole power to legislate does so and specifies certain crimes under the common law to be first degree murder when a killing is perpetrated in its commission, and specifically excludes all other killings from being murder in the first degree unless done deliberately, with premeditation and malice aforethought, may State courts allow state juries to convict for an "unlawful" act as part of an alleged killing and make it murder in the first degree if the jury finds such, so that the state statute involved is nullified, and in effect remade to the wishes of the particular jury in what it wishes to regard as an "unlawful" act punishable by death in a particular case.

c) May state courts uphold what the jury supposedly found was an "unlawful" act under these statutes without the definition of the legal elements of any act recognised at law as unlawful, so that lesser and different evidence is required to convict than when an offense recognised at law is charged, and must be proved on a state trial to a state jury according to all its legal elements, so that in fact there is a denial of the equal protection of the law where state juries decide under these statutes what is an "unlawful" act.

d) Do such statutes reasonably inform the accused of that which is to be defended against when state juries decide what is an "unlawful" act to be punished thereunder, the defendant having no possible way to determine what the jury will conclude to be an "unlawful" act.

e) Do not such statutes so used permit the application of ex post facto law by state juries in convicting thereunder.

f) For any one or more of the foregoing reasons must State Legislatures define the law, and must state juries be held to and instructed under that law, so that state court defendants may be reasonably informed and have an opportunity to defend, as well as the equal protection of the

law, and so that it may be determined that the law as enacted by the state legislatute has been met.

Death, and life, sentences have and are being imposed under these statutes across the country by juries deciding what is an "unlawful" act, and since this Court's latest ruling on the death penalty, such sentences are now being made mandatory. Whether these state statutes used to inflict such sentences are constitutional ought to be determined inasmuch as these issues are squarely presented in this case wherein the state jury was allowed to convict and render a death sentence on finding an "unlawful" act involved, and contrary to the specific terms of the state statute involved.

3. The decisions of the Second Circuit raise significant and important federal jurisdiction, practice and procedural problems that call for the exercising of this Court's supervision.

The Courts of the Second Circuit have ignored the rulings of this Court on identical issues, denied federal jurisdiction based on the U.S. District Court's own records, ignored the Rules of pleading and evidence in general, and Rules 56 § (a) and (e) and 15 (a) of the Federal Rules of Civil Procedure in particular. The U.S.

District Court for Connecticut made a decision completely without support of any kind in the record, and unsustainable by fact in holding that the issue of knowing use of false evidence to convict was previously decided, which cannot be sustained by any record, and was and is a fiction that evades this Court's rulings. This Court should intervene to prevent such practices and any encouragement of them.

Further, Cole V. Arkansas, 333 U.S. 196, ought to be resolved so that federal jurisdiction will lie where relief by certiorari has become unavailable directly to this Court on the abuse of state statutes by state courts in upholding convictions wrongfully under them.

Conclusion

For these reasons, a writ of certiorari should issue to review the decisions, orders and judgments of the Second Circuit.

Respectfully submitted

Francis C. Smith
Box 100
Somers, Conn.
06071

August 1973

STATE OF CONNECTICUT

COUNTY OF FAIRFIELD

My name is John H. Smith and I reside in the Town of Norwalk, Fairfield County Connecticut, at 5 Hill Street. I am over eighteen years of age and I am a citizen of the United States of America and not a party to the within entitled action.

On the day of 1973, I served three (3) true copies of the within Petition for a Writ of Certiorari, and the Appendix thereto, on the Attorney for the Respondents, Assistant State Attorney Richard F. Jacobson, by enclosing said copies in a sealed envelope with postage first-class thereon fully prepaid in the United States mail at Bridgeport, Connecticut, addressed as follows:

Asst. State Attorney
Richard F. Jacobson
172 Golden Hill Street
Bridgeport, Connecticut
06604

I, John H. Smith, having been duly sworn, attest to the truth of the foregoing under penalty of perjury, before , Notary Public, on this day of 1973, at Connecticut.

John H. Smith

To the truth of the foregoing, I , Notary Public, on this day of 1973, notarise and set with my seal of office

Seal

Notary Public